Petition

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No. 81-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENNIE E. JETER, ERIN T. JETER, JOE S. ANDERSON, RACK ENGINEERING, INC.,

Petitioners,

v.

ASSOCIATED RACK CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether Petitioners were denied due process of law by a general verdict which could have been wholly based on a theory of recovery that had been abandoned by the Respondent.

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OPINION BELOW

The opinion of the Texas Court of Civil Appeals for the Sixth Supreme Judicial District sitting at Texarkana is styled *Jeter* v. *Associated Rack Corporation.* It is reported at 607 S.W.2d 272 and reproduced in the Appendix at pages A-1 to A-9. The Texas Supreme Court denied an application for writ of error without opinion as set forth in the Appendix at page A-10. The Texas

Supreme Court without opinion overruled a motion for rehearing as set forth in the Appendix at page A-11.

JURISDICTION

The opinion of the Texas Court of Civil Appeals for the Sixth Supreme Judicial District sitting at Texarkana was rendered August 26, 1980. The Court of Civil Appeals denied rehearing on November 10, 1980. Petitioners' application for writ of error was denied by the Texas Supreme Court on March 18, 1981. A timely motion for rehearing was denied by the Texas Supreme Court on May 13, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"[N]or shall any State deprive any person of . . . property without due process of law. . . ."

STATEMENT OF THE CASE

Respondent Associated Rack Corporation is a manufacturer and seller of racks used in the process of electroplating. The company operates in Texas and five other states through a subsidiary, Southwestern Rack Company, located in Grand Prairie, Texas. Petitioners Bennie E. Jeter and wife Erin T. Jeter were employed respectively as plant manager and assistant plant manager of Southwestern Rack until their voluntary termination on May 27, 1977. Petitioner Joe Steven Anderson is Mrs. Jeter's brother and was employed by Associated Rack in various capacities until December, 1976. Subsequent to their employment with Associated Rack, Mr. Jeter, Mrs. Jeter, and Mr. Anderson formed Rack Engineering, Inc., also a Petitioner in this Court.

On June 9, 1977, Associated Rack instituted an action against the Petitioners in the 95th Judicial District Court of Dallas County, Texas. The essential allegation of the lawsuit was that

the Jeters had wrongfully taken certain materials and documents maintained by Associated Rack at its Grand Prairie plant. The plaintiff contended that the Jeters and Anderson would use these items to compete with their former employer and to divert its customers. Associated Rack sought injunctive relief and damages.

The trial began August 14, 1978. The key witness for the plaintiff was its president, William L. Faulman. Mr. Faulman testified that the Jeters had taken the following items from the Grand Prairie plant:

a. Sample rack tips designed by Associated Rack. (The tips hold the article to be electroplated to the plating rack.)

b. Cards containing a sketch of racks previously designed by Southwestern Rack as well as the material content and manufacturing specifications of each.

c. Pricing cards indicating the amounts charged to customers of Southwestern Rack for the racks that those customers had ordered.

d. Invoices of Southwestern Rack to its customers during a six-month period.

e. A list of Southwestern Rack customers and the volume of business done with each in 1975 and 1976.

Mr. Faulman further testified that the Jeters and Anderson knew that these items were secret and that possession of them would benefit another business in competing with Southwestern Rack.

After the plaintiff had rested, and during the presentation of the defendants' evidence, the plaintiff sought to amend its pleadings to allege that the actions of the individual defendants constituted a conspiracy to misappropriate confidential business information of the plaintiff. Approximately the same time in the trial, the plaintiff on several occasions emphatically abandoned any allegation of the defendants' taking of the plaintiff's trade

secrets. The trial court allowed the trial amendment because of its belief that an issue of conspiracy had been raised by the evidence. From the trial amendment, the District Court derived the primary issue submitted to the jury:

> "Do you find from a preponderance of the evidence that defendants, by using any of the properties obtained from the premises of plaintiff, engaged in a conspiracy to divert and take away the customers of plaintiff?"

The jury answered this issue in favor of plaintiff and also found that the conspiracy had succeeded in diverting plaintiff's customers. The jury found actual damages of $46,000.00 and exemplary damages of $54,000.00. Based on the verdict, the District Court entered judgment in plaintiff's favor for $100,000.00 against all defendants and decreed certain injunctive relief.

In Paragraph V of their amended motion for new trial, the defendants contended that the trial court had erred in its global submission of the conspiracy issue. The defendants urged that an agreement to divert customers becomes conspiratorial only if the agreement involved illegal action such as the misappropriation of trade secrets. The general submission to the jury concerning the use of "any of the properties" was urged to be erroneous because the verdict could have encompassed the use of trade secrets, a ground of recovery which plaintiff had abandoned. The District Court overruled the amended motion for new trial. The essence of the appeal in the state court was that the conspiracy issue should not have been submitted. Defendants argued that since plaintiff had abandoned the cause of action concerning trade secrets, there could be no cause of action for conspiracy to divert customers by using trade secrets. But, defendants contended, the jury submission allowed the jury to find that the defendants diverted plaintiff's customers by the use of trade secrets even though that part of the plaintiff's suit had been dismissed. The Court of Civil Appeals rejected the defendant's arguments and affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THE TEXAS COURT OF CIVIL APPEALS HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT:

The plaintiff in the trial court on three separate occasions specifically disclaimed any reliance on the defendants' taking of trade secrets as a basis for relief.* Instead, plaintiff predicated its claim on a conspiracy by the defendants to misappropriate "confidential information." The line between "confidential information" and "trade secrets" is not always a clear one. Yet some of the items plaintiff said had been improperly taken were unquestionably trade secrets under Texas law. With the general verdict of the jury, however, it is quite possible that the jury found that the defendants had conspired to divert customers by using plaintiff's trade secrets even though plaintiff had previously dismissed this as a foundation for damages. The defendants are unable to determine if they must now pay plaintiff $100,000.00 for acts for which they were not sued, namely taking trade secrets. This outcome is in violation of constitutional principles set forth by this Court as early as *Stromberg* v. *California*, 283 U.S. 359 (1931).

In *Stromberg*, the defendant had been convicted under a criminal statute which made it unlawful to display a flag as a

* At page 563 of the Statement of Facts, plaintiff's counsel made the following statement:

"Your Honor, trade secrets are not an issue. Only confidential and proprietary information. It is immaterial and irrelevant."

At page 566 of the Statement of Facts, plaintiff's counsel stated as follows:

"Your Honor, we are not talking about trade secrets, only about confidential information."

At page 622 of the Statement of Facts, plaintiff's counsel informed the Court:

"Your Honor, we are not pleading trade secrets."

sign of opposition to organized government OR as a stimulus to anarchistic action OR as an aid to seditious propaganda. The jury charge allowed a conviction if the jury believed that the flag had been displayed for any one of the three proscribed purposes. The California appellate court expressed doubt as to whether a conviction for displaying a flag in opposition to organized government could withstand a challenge under the First Amendment. That court nonetheless upheld the conviction because it believed a display for either of the other two purposes would no doubt be valid. Thus the questionable section of the law could be disregarded.

This Court reversed. It agreed that the first clause of the California law was an abridgement of free speech, but it held that the conviction could not stand. The verdict of guilty had been a general one, and there was no way of ascertaining whether the defendant had been found guilty of violating the constitutional or the unconstitutional provisions of the statute. Such a verdict was deemed to be a violation of the due process clause of the Fourteenth Amendment.

This aspect of *Stromberg* was consistently followed by this Court in criminal cases. See *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942); *Cramer* v. *United States*, 325 U.S. 1, 36, n.45 (1945); *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957). In *New York Times Company* v. *Sullivan*, 376 U.S. 254, 283-84 (1964), this Court extended the rationale of *Stromberg* to civil cases. In *New York Times*, this Court held that a public official must prove actual malice in a libel suit to obtain either general damages or exemplary damages. In accordance with Alabama law existing at the time of trial, the trial court had instructed the jury that actual malice must only be shown to justify exemplary damages. The jury was further instructed that actual malice was not a necessary element for a recovery of actual damages. The jury's verdict of $500,000.00 was a general one and not divided into the two different types of

damages. Thus it was possible that the damages had been awarded even though the jury had not found actual malice. Because of this uncertainty, the judgment was deemed to be constitutionally deficient.

A review of Texas law will show that some of the items the defendants took were, beyond peradventure, trade secrets. It is not possible though to determine if the jury verdict was based on the abandoned claim of misappropriation of trade secrets or on the relied upon claim of misappropriation of confidential information. The action of the lower courts in this case is thus in violation of the *New York Times Company* v. *Sullivan* decision.

The most frequently cited definition of trade secrets in Texas jurisprudence appears in *Hyde Corporation* v. *Huffines*, 314 S.W.2d 763, 776 (Tex. 1958) (on rehearing), *cert. denied*, 358 U.S. 898 (1958):

> "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. * * * A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article."

(Ellipsis in the original). Essentially the same definition of trade secrets has been given in numerous cases following *Hyde Corporation*. See e.g., *K & G Oil Tool & Service Co.* v. *G & G Fishing Tool Service*, 314 S.W.2d 782, 789 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958); *Brown* v. *Fowler*, 316 S.W.2d 111 (Tex. Civ. App. — Fort Worth 1958, writ ref'd n.r.e.); *Furr's Inc.* v. *United Specialty Advertising Company*, 338 S.W.2d 762, 765 (Tex. Civ. App. — El Paso 1960, writ ref'd n.r.e.); *Luccous* v. *J. C. Kinley Company*, 376 S.W.2d 336, 338 (Tex. 1964);

Elcor Chemical Corporation v. *Agri-Sul, Inc.*, 494 S.W.2d 204, 211 (Tex. Civ. App. — Dallas 1973, writ ref'd n.r.e.); *Thermotics, Inc.* v. *Bat-Jac Tool Company, Inc.*, 541 S.W.2d 255, 260 (Tex. Civ. App. — Houston (1st Dist.) 1976, no writ history).

Under the *Hyde Corporation* definition, the customer lists are clearly trade secrets. As to the sample rack tips and the sketch cards, the evidence is undisputed that these articles have but one purpose — to facilitate the production of racks for customers who have ordered similar racks in the past. Mr. Faulman testified that with these rack tips and sketch cards, a competitor could gain a marked advantage because he would have all the information necessary to produce a rack and would not have to develop a new one completely from scratch. Without any question, the sample rack tips and the sketch cards fall within the Texas definition of "trade secrets."

The general verdict makes this Court unable to determine if the damages were assessed for the taking of customers by the use of trade secrets, a cause of action dismissed by the plaintiff. Since customer lists, sample rack tips, and sketch cards are all undeniably trade secrets, the possibility is substantial that defendants may have to pay a judgment for committing acts that were not made the basis of a lawsuit against them. Such a result violates the due process clause of the Fourteenth Amendment.

CONCLUSION

This Court should grant a writ of certiorari to prevent a result condemned by a half century of constitutional decision.

Respectfully submitted,

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Of Counsel:

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Dated: August 10, 1981
Houston, Texas

CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioners, a member of the Bar of the Supreme Court of the United States, certifies that counsel for respondent, Donald E. Godwin, has been served with three copies of the foregoing Petition for Writ of Certiorari by depositing the documents in a United States Post Office or mailbox, with first class postage prepaid, addressed to said counsel for Respondent, at his post office address, 1200 Diamond Shamrock Building, Dallas, Texas 75201.

All parties required to be served have been served.

Dated: August 10, 1981

BERTRAND C. MOSER

APPENDIX

BENNIE E. JETER, ET AL.,

Appellants

v.

ASSOCIATED RACK CORPORATION,

Appellees

No. 8757

Court of Civil Appeals of Texas, Texarkana.

August 26, 1980

Rehearing Denied November 10, 1980

RAY, Justice.

This is an appeal from a judgment granting a permanent injunction and awarding actual and exemplary damages in the total sum of $100,000.00. Appellee (plaintiff), Associated Rack Corporation, brought suit against appellants (defendants), Bennie E. Jeter, Erin T. Jeter, Joe Steven Anderson and Rack Engineering Company, Inc., seeking damages and injunctive relief on the theory that appellants misappropriated confidential business information. The case was tried to a jury, and based upon the jury's verdict the trial court entered its judgment awarding appellee actual and exemplary damages and injunctive relief. Appellants have perfected their appeal and submit 18 points of error for our consideration.

Appellee Associated Rack Corporation is engaged in the design, manufacturing and marketing of electroplating racks. The company operates in Texas through one of its subsidiaries, Southwestern Rack Company, located in Grand Prairie. Appellants Bennie Jeter, and wife, Erin Jeter, were the plant manager and assistant plant manager, respectively, of appellee's Southwestern Rack division from 1971 until their termination on May

27, 1977. Appellant Joe Anderson is Mrs. Jeter's brother and was at different times employed by division of appellee in Chicago and Grand Prairie. Anderson left the employ of appellee in December of 1976. While holding positions with the company, appellants had access to certain confidential information utilized by Southwestern Rack Division, including customer lists, pricing cards, product sketches and sample contact tips, a customized part of the rack.

Between December of 1976 and May of 1977, the appellants began considering the idea of leaving Associated Rack and forming their own company. Their plan was to go into competition with the appellee. It is undisputed that the appellants discussed their plans with several other employees of Associated Rack. Some were asked if they would care to follow the Jeters when they eventually started their business. During this time, Erin Jeter had begun to collect sample rack tips. The alleged purpose was to facilitate the design of a similar product when the appellants subsequently went into business. Several other employees assisted Mrs. Jeter in collecting the rack tips at her request.

On May 27, 1977, the Jeters' employment with Associated Rack was terminated. The following day, Bennie Jeter, accompanied by an employee of Associated Rack, William Wall, returned to the offices of the appellee. It is undisputed that at this time, Bennie Jeter did collect and photocopy various items of business information and data belonging to the appellee, including customer lists, pricing cards and product sketches. The purpose of such action, as testified to by Bennie and Erin Jeter, was to facilitate the formation of their company, Rack Engineering, Inc. The Jeters and Anderson own equal interests in Rack Engineering, Inc.

The appellants' points of error are summarized and discussed as follows:

(1) The trial court failed to submit an "ultimate" or controlling issue to the jury;

(2) The court erred in admitting testimony concerning an oral non-competition agreement because of its prejudicial and inflammatory nature;

(3) Testimony concerning a prior injunctive order violated an order granting a motion in limine;

(4) The trial court erred in commenting on the weight of the evidence;

(5) The court erred in allowing appellee to file a trial amendment;

(6) There was no evidence or insufficient evidence to support the jury's findings; and

(7) The court erred in failing to sever appellee's action for equitable relief.

ULTIMATE OR CONTROLLING ISSUE

The primary emphasis of appellants' argument is that the trial court failed to submit the case on a proper controlling issue. Appellants contend that the issue of the existence of a conspiracy was a subordinate issue to the question of whether there was any independent, actionable wrong committed by the appellants which gave rise to an alleged conspiracy, i.e., appellants argue that the controlling issue would have inquired into the use of trade secrets, the breach of fiduciary duties, the breach of an employment agreement or the interference with the contractual relations between Associated Rack and its customers.

A civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Schlumberger Well Surveying Corp.* v. *Nortex Oil & Gas Corp.*, 435 S.W.2d 854 (Tex. 1968); *International Bankers Life Insurance Company* v. *Holloway*, 368 S.W.2d 567 (Tex. 1963).

Throughout the trial, the appellants insisted that they appropriated and accumulated the business information belonging to Associated Rack for the sole purpose of going into competition with the appellee. The central thrust of appellants' argument is that this information was readily accessible on the open market. There was testimony that industry-wide manuals provide design and manufacture information concerning electroplating racks. There was testimony that at times customers or purchasers of such racks would allow suppliers to photograph the racks. Design modifications could be made from such photos. This, appellants contend, destroys the confidential nature of this information. In essence, appellants contend that the existence of a lawful means of acquiring the information precludes recovery for the use of unlawful means.

The same argument was presented to, and rejected by, the Texas Supreme Court in *K & G Oil Tool & Service Company* v. *G & G Fishing Tool Service*, 158 Tex. 594, 314 S.W.2d 782 (1958), *cert. denied*, 358 U.S. 898, 79 S.Ct. 223, 3 L.Ed.2d 149 (1958). There the Supreme Court quoted language from other jurisdictions holding that it is unquestionably lawful to gain possession, through proper means, of a competitor's product and, through inspection and analysis, create a duplicate, unless the item is patented. However, the mere fact that such lawful acquisition is available does not mean that he may, through breach of confidence, gain the information in usable form and escape the efforts of inspection and analysis.

The evidence in the instant case clearly shows that Associated Rack considered its customer lists, pricing cards and rack designs to be confidential material. Furthermore, it is uncontroverted that the appellants accumulated these items both during and immediately after their employment with the appellee. The general rule is that an employee has a duty not to disclose the confidential matters of his employer. *Lamons Metal Gasket Co.* v. *Traylor*, 361 S.W.2d 211 (Tex.Civ.App. Houston 1962,

writ ref'd n.r.e.); Restatement (Second) of Agency § 396(b)(1958). The fact that this information might have been available on the open market is not determinative. The primary issue is whether the appellants engaged in a course of conduct to obtain access to confidential business information from the premises of Associated Rack, without permission in order to facilitate the forming of their new corporation.

Special Issue No. 1 as submitted to the jury was as follows:

> "Do you find that a preponderance of the evidence that defendants, by using any of the properties obtained from the premises of plaintiff, engaged in a conspiracy to divert and take away the customers of plaintiff?
>
> Answer 'They did' or 'They did not'.
>
> ANSWER: They did"

This question contains several of the elements necessary to submit to the jury the issue of whether the appellants conspired to and actually did wrongfully misappropriate the confidential business property of Associated Rack. However, the element as to whether these items were "confidential" is not touched. The absence of an issue inquiring into the confidential nature of the business property, however, is not fatal to appellee's recovery.

Under the "cluster of issues" principal stated in Rule 279, Tex.R.Civ.P., when a ground of recovery consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery are submitted and answered by the jury, and one or more issues are omitted, without objection by the party complaining of the judgment, then the omitted issue, if raised and supported by evidence, must be deemed as found by the trial court in such a manner as to support its judgment. *Kirk* v. *Standard Life and Accident Insurance Co.*, 475 S.W.2d 570 (Tex.1972); *Wichita Falls & Oklahoma Ry. Co.* v. *Pepper*, 134 Tex. 360, 135 S.W.2d 79 (1940).

A careful review of the record convincingly establishes the confidential nature of the items in question. The time necessary for Associated Rack to accumulate product designs and to develop a competitive customer listing and pricing formula, emphasizes the confidential nature of this information.

There was sufficient evidence for the trial court to have concluded that the information taken by appellants was confidential.

ADMISSION OF TESTIMONY REGARDING AN ORAL NON-COMPETITION AGREEMENT

Associated Rack pled alternative causes of action, including a breach of a non-competition agreement. Evidence was admitted concerning the company's policy that plant managers at the appellee's various divisions had orally agreed not to compete upon their termination of employment. However, it is clear that at the time of submission of the case to the jury, appellee had abandoned this cause of action. The cause was submitted solely on the theory that the appellants conspired to misappropriate the confidential business information of their employer. While evidence of a non-competition agreement may be irrelevant as to whether the appellants conspired to misappropriate confidential information, it does not constitute reversible error under Rule 434, Tex.R.Civ.P.

MOTION FOR MISTRIAL

Appellants complain that the trial court committed reversible error in failing to declare a mistrial after appellee's witness testified that the appellants had returned the business information to appellee under court order. A motion in limine had been granted forbidding any mention of the issuance of a prior temporary injunction. The appellants have not shown how they were harmed in this matter. A trial judge is vested with broad discretion in the manner in which a trial is controlled, and a judgment will not be reversed unless probable prejudice is shown. *Fulmer*

v. *Thompson*, 573 S.W.2d 256 (Tex.Civ.App. Tyler 1978, writ ref'd n.r.e.)

COMMENT ON THE WEIGHT OF THE EVIDENCE

In Point of Error No. 9, the appellants complain that the trial court made an erroneous comment on the weight of the evidence and that such comment influenced and prejudiced the jury against the appellants. We find no merit in this point since the court asked a question of appellants' counsel. Mr. Ben Jeter had been asked if he were actively entertaining going into business for himself between January and March, 1977. His answer was that, "I don't believe so. Just considering it." Subsequently, appellants' counsel asked Jeter if he spent any of his personal funds for equipment which he would use if he ever started a company on his own, and Jeter's answer was that he had. Jeter was then asked how much money he had spent and he answered, "Somewhere in the neighborhood of $1,500.00 and $1,600.00, something like that." Upon objection of counsel for Associated Rack, appellants' counsel stated to the court the following:

> "The relevance, I think, Your Honor, is this. That if we can show the amount of money that it takes to put one of these organizations together and the amount of money that he has spent, we can show just exactly how serious he was really intending to go into business."

The court then asked the question, "Well, I don't think there is any question he was serious. He said that, didn't he?" Appellants' counsel answered, "No."

The court stated, "Well, I don't see what the amount of money has to do with it. I will sustain the objection."

This Court has determined that the appellants have failed to show such question to be so prejudicial as to require a reversal of this case. Appellants have not sustained their burden of showing that the purported statement-question caused the jurors to believe that the trial court was conveying to the jury his opinion

of the evidence and that such statement-question probably misled the jury. *Texas Employers' Ins. Ass'n* v. *McKay*, 146 Tex. 569, 210 S.W.2d 147, 149 (1948). Point of Error No. 9 is overruled.

APPELLEE'S TRIAL AMENDMENT

Rule 66, Tex.R.Civ.P., provides that the trial court shall freely allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that such amendment will prejudice the maintaining of his defense. The court has wide discretion in the matter. *Vermillion* v. *Haynes*, 147 Tex. 359, 215 S.W.2d 605 (1948). No abuse has been shown in the instant case. The trial court permitted appellee to file a trial amendment stating a cause of action against the appellants on a theory of conspiracy to misappropriate and *unlawfully use the* property of the appellee. It is the opinion of this Court that the trial court did not abuse its discretion in allowing the trial amendment and that the evidence was sufficient to sustain the jury's answer to Special Issue No. 1. The allowance of a trial amendment will not result in a reversible error in the absence of a plea of surprise *and* a request for postponement or continuance. *Santa Rosa Medical Center* v. *Robinson*, 560 S.W.2d 751, 758 (Tex.Civ.App. San Antonio 1977, no writ). Appellants did not plead surprise or request a continuance. Appellants have thus waived their objections to appellee's filing of a trial amendment. Appellants' Point of Error No. 12 is overruled.

JURY TRIAL ON EQUITABLE RELIEF

Appellants complain of the trial court's affording the appellee a jury trial on its action for equitable relief. The law in Texas is that the right to a jury trial extends to disputed issues of fact in equitable as well as legal proceedings. Tex.Const. art V, §§ 8 and 10; *Reynolds-Penland Co.* v. *Hexter & Lobello*, 567 S.W.2d 237 (Tex.Civ.App. Dallas 1978, Dism'd Agr.). In

response to Special Issue No. 7, the jury found that the conspiracy had not terminated. On this basis, the trial court granted the injunction. The evidence substantiates the jury's finding and it is our opinion that the appellee was entitled to an injunction to stop the ongoing conspiracy. It is our further opinion that future damages would have been difficult if not impossible to ascertain and thus the trial court was justified in granting injunctive relief. The appellee had the right to elect to maintain an action at law for damages for its past injuries and at the same time seek equitable relief through an injunction or other extraordinary remedy to abate the continuance of the injury. The existence of a remedy at law is not ground for denial of injunctive relief unless the legal remedy is as practical and efficient to the ends of justice as the equitable remedy. *Sumner* v. *Crawford*, 91 Tex. 129, 41 S.W. 994, 995 (1897); *McGonagill* v. *Hide-A-Way Lake Club, Inc.*, 566 S.W.2d 371 (Tex.Civ.App. Tyler 1978, no writ). The trial court did not abuse its discretion in granting the injunction.

Appellants' points of error are overruled. The judgment of the trial court is affirmed.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

March 18, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of *Jeter et al.* v. *Associated Rack Corpn.*, No. C-3 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, *Clerk*

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

May 13, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of *Jeter et al.* v. *Associated Rack Corpn.*, No. C-3 was this day overruled.

Very truly yours,

GARSON R. JACKSON, *Clerk*

Opposition

Opposition

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ALEXANDER L. STEVAS
CLERK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT

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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1980

BENNIE E. JETER, ERIN T. JETER, JOE S. ANDERSON, RACK ENGINEERING, INC.,

Petitioners,

V.

ASSOCIATED RACK CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3) provides as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties

or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Respondent adopts Petitioners' statement of the case except it would point out to this Court that Petitioners did not object to the submission of the conspiracy issue because it deprived them of due process of law. Further, Petitioners failed to raise in their amended motion for new trial that they had been deprived of due process of law because the judgment was based upon a general verdict.

Petitioners did present a point of error to the Court of Civil Appeals alleging denial of due process. However, in their arguments and authorities under said point, the substance of Petitioners' argument is that they were in effect denied a trial by jury because the trial court did not submit all the controlling issues in the case.

SUMMARY OF ARGUMENT

This Court should deny writ of certiorari in this case because this Court lacks jurisdiction to review federal questions which were not specially set up or claimed in the state court. The question presented to the Court was not raised, preserved and ruled upon by the Courts below.

Further, if this Court determines that the federal question was properly presented to the Court of Civil Appeals, the Court of Civil Appeals decided the question based upon adequate and independent state grounds.

REASONS FOR DENYING WRIT

I

THE FEDERAL QUESTION PRESENTED FOR REVIEW BY THIS COURT WAS NOT SPECIALLY SET UP OR CLAIMED IN THE STATE COURTS.

In order that this Court may review, by writ of certiorari, a final judgment or decree by the highest court of a State in which a decision could be had, a title privilege or immunity must be "specially set up or claimed under the Constitution, treaties or statutes of, or commission held or exercise under, the United States." 28 U.S.C. §1257(3).

Petitioners have for the first time specially set up or claimed the sole federal question presented to this Court for review. It was not until Petitioners filed application for writ of certiorari that they have claimed that the submission of a general jury charge by the trial court denied them due process of law because the verdict could have been based wholly on a theory of recovery that had been abandoned by the Respondent.

This federal question had never been raised, preserved, or passed upon by the state courts below. This Court has specifically held that "the Court will not decide federal Constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). *See also*: *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 79 S.Ct. 1196, 3 L.Ed.2d 1280 (1959), *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940).

Aside from the fact that the failure to raise the federal question affects this Court's jurisdiction, this Court has set out additional reasons for this requirement. This Court stated in *Cardinale v. Louisiana, supra*, at 439, that:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Petitioners did raise on appeal to the Court of Civil Appeals a federal question by asserting a denial of due process by the trial court in failing to submit the case on a valid cause of action or controlling issue of liability. This question, beside the fact that it is not the same federal question presented to this Court[1], was not asserted by Petitioners in the trial court and as a result it was not timely and properly raised in order that the trial court could pass on the issue. Since the trial court did not have the issue before it, the question was not subject to review by the Court of Civil Appeals. *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d 668 (Tex. 1979); *Powell v. Powell*, 604 S.W.2d 491 (Tex. Civ. App. — Dallas, 1980, no writ).

The only exception to rule that an issue will not be considered on appeal when not raised in the trial court is when the error is fundamental error. *Ellis v. Hanks*, 478 S.W.2d 172 (Tex. Civ. App. — Dallas, 1972, writ ref. n.r.e.).

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[1]Petitioners, in their argument and authorities in support of their point of error to the Court of Civil Appeals contended they were denied due process for the reason that they were denied a trial by jury.

In Texas fundamental error has been defined as such error that directly and adversely affects the interests of the public generally. *Ramsey v. Dunford*, 146 Tex. 196, 205 S.W.2d 979 (1947). Petitioner failed to demonstrate to the Court of Civil Appeals that the issue presented before it concerning denial of due process by the trial court in the submission of the jury charge constituted fundamental error. As a result the federal question was not decided by the Court of Civil Appeals.

This Court has held that in order for the Court to review a state court judgment, it is essential to this Court's jurisdiction that there be an explicit and timely insistence in the state court in calling the federal question into issue. *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857 (1945).

The failure of Petitioners to timely and properly raise the issue is apparent on the face of the record by the fact that the question has never been passed upon or reviewed by the trial court or the Court of Civil Appeals. Since the question presented to this Court for review has not been passed upon, there exists no state judgment deciding a federal question to be reviewed by this Court.

II.

THE QUESTION PRESENTED TO THIS COURT FOR REVIEW WAS DECIDED BY THE COURT OF CIVIL APPEALS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Assuming that the federal question presented to this Court was timely and properly preserved in the trial court, which Respondent respectfully contends it was not so preserved, the issue as to the recovery by Respondent based

upon general verdict was properly and correctly decided by the Court of Civil Appeals on adequate and independent grounds. As a result, this Court does not have jurisdiction to review the decision of the Court of Civil Appeals.

This Court in *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1954), expressly stated this rule. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state ground." *Id.* at 125. This principle was announced again by this Court in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), wherein it was stated "[a]s to the role of adequate and independent state grounds, it is a well established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Id.* at 81. This principle applies not only to cases involving state substantive grounds but also cases involving state procedural grounds. *Fay v. Noia*, U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Herb v. Pitcairn, supra.*

The independent and adequate state grounds upon which the decision below rests, specifically addresses Petitioners' complaint that the judgment of the trial court, which awarded Respondent damages for Petitioners' conspiracy to divert and take away customers of Respondent, was based upon an alleged "general verdict."

The Court of Civil Appeals in its decision ruled that the conspiracy question submitted to the jury contained several of the elements necessary to submit to the jury the issue of Respondent's cause of action against Petitioner. It was

noted, however, that an element of Respondent's cause of action was not submitted to the jury; that element being whether the items taken by Petitioner from Respondent were confidential. The Court ruled that the failure of the trial court to submit this aspect of the cause of action was not fatal to Respondent's recovery.

The Court of Civil Appeals relied upon Texas Rule of Civil Procedure 279 as its basis for upholding the judgment of the trial court based upon the jury verdict as submitted to the jury. The rule states in part:

> Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment.

See generally, Kirk v. Standard Life and Accident Ins. Co., 475 S.W.2d 570 (Tex. 1972); *Hoffman v. Wall*, 602 S.W.2d 324 (Tex. Civ. App. — Texarkana 1980, writ ref. n.r.e.); *City of Lubbock v. Onley*, 498 S.W.2d 429 (Tex. Civ. App. — Amarillo, 1973, writ ref. n.r.e.).

The Court of Civil Appeals implicitly found that Petitioners did not expressly object to the trial court's failure

to submit the issue of whether the items were confidential. A party objecting to the omission of an issue in the jury charge "must point out distinctly the matter to which he objects and grounds of his objection." Texas Rule of Civil Procedure 274. Petitioner, however, failed to object that the charge as submitted to the jury did not include the issue inquiring into whether the items taken by Petitioner were confidential.

Petitioner, in their petition for writ of certiorari, argue that they raised their objections to the charge in their Motion for New Trial. This objection, however, was untimely so as to be considered by the trial court. Tex. R. Civ. P. Ann. 274; *Clagett v. Neugebauer*, 376 S.W.2d 768 (Tex. Civ. App. — Austin 1964, no writ); *Gale v. Spriggs*, 346 S.W.2d 620 (Tex. Civ. App. — Waco 1961, writ ref. n.r.e.).

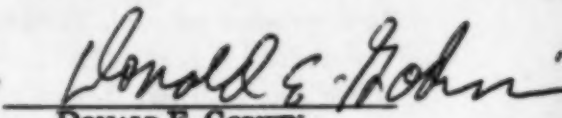
Once it has been determined that no proper objection has been raised to the omission of an issue the only question remaining is whether there is evidence to support a finding that the items taken by Petitioner were confidential. *Kirk v. Standard Life and Accident Ins. Co., supra.* The Court of Civil Appeals, after reviewing the evidence, found that there existed sufficient evidence to support such a finding and thus affirmed the trial court.

The decision of the Court of Civil Appeals, addressing itself to Petitioner's complaint as to the judgment based upon the verdict of the jury, rests on adequate and independent state grounds. As a result, the federal question presented to this Court was never reached or determined by the Court of Civil Appeals.

CONCLUSION

This Court should deny a writ of certiorari because this Court lacks jurisdiction to review the state court judgment.

Respectfully submitted,
MAXWELL, GODWIN, BENNETT, THOMAS,
CARLTON & MAXWELL

By 
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Dated: September 8, 1981
Dallas, Texas

CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Petitioners, Bertrand C. Moser, has been served with three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by depositing the documents in a United States Post Office or mailbox, with first class postage prepaid, addressed to said counsel for Petitioners, at his post office address, 1200 South Tower, Pennzoil Place, Houston, Texas 77002.

All parties required to be served have been served.

Dated: September 8, 1981

DONALD E. GODWIN